

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

IN RE)	
)	Case No. 97-40774
CUSTOM SPRAY TECHNOLOGIES,)	
INC., d/b/a CST, INC.,)	SUMMARY ORDER RE
)	MOTION FOR PAYMENT
Debtor.)	OF ADMINISTRATIVE
_____)	CLAIM

Background and Facts

Attorney Marvin M. Smith ("Smith") filed a Motion for Payment of Administrative Claim (Docket No. 47) in this case. Chapter 7 Trustee, L.D. Fitzgerald ("Trustee") objected. A hearing on the motion was held on September 7, 2000, after which the matter was taken under advisement.

The following facts appear from the record and submissions of the parties. Debtor Custom Spray Technologies, d/b/a CST, Inc. ("Debtor") filed a voluntary Chapter 7 petition on July 25, 1997. Prior to bankruptcy, creditor Patricia Graves ("Graves"), represented by Smith, obtained a default judgment against Debtor in state court in the amount of \$96,199.75. On June 18, 1997, she obtained a writ of execution and, with the assistance of the county sheriff, executed upon Debtor's assets, including equipment and tools. A sheriff's sale was held on July 23, 1997, at which time Graves successfully credit bid \$6,000

for the property. Smith contracted and paid for commercial storage of the property purchased by his client at the sheriff's sale beginning June 18, 1997, and continuing through February 2000.

In the meantime, after the bankruptcy was filed, on October 28, 1997, Trustee requested an accounting of the property held by Graves and Smith. On February 19, 1998, Trustee's attorneys made a written demand upon Graves to turn over the property to Trustee. When Debtor did not comply with the demand, on October 16, 1998, Trustee commenced an adversary proceeding against Graves to avoid any alleged lien claimed by her in the property and to compel turnover of the property. Trustee moved for summary judgment against Graves in the adversary proceeding, and on September 9, 1999, this Court orally ruled in Trustee's favor. Graves' alleged security interest and subsequent acquisition of the property were deemed avoided pursuant to Sections 544(a) and/or 547(b) of the Bankruptcy Code, and she was ordered to turn over the property to Trustee. Judgment to that effect was entered on December 14, 1999 (Docket No. 32, Case No. 98-6276).¹ Debtor turned over the property to Trustee sometime in February 2000.

¹ The Court understands its ruling is currently on appeal to the United States District Court for Idaho.

Smith filed his motion seeking allowance and payment of an administrative expense claim on June 26, 2000. He seeks \$2,283.60 for reimbursement of the costs of storage of the property he paid from June 18, 1997, through February 2000.

Disposition

Section 503 requires the bankruptcy estate to pay all administrative expense incurred for “the actual, necessary costs and expenses of preserving the estate” 11 U.S.C. § 503(b)(1)(A). This provision is construed narrowly, in order to “maximize and protect the limited assets of the bankruptcy estate for the benefit of the unsecured creditors,” which is “particularly important in a Chapter 7 case.” *In re Coolex*, 96.1 I.B.C.R. 35, 36 (Bankr. D. Idaho 1996) (citing *In re Palau Corp.*, 18 F.3d 746, 750 (9th Cir. 1994); *In re Dant & Russell, Inc.*, 853 F.2d 700, 706 (9th Cir. 1988); *In re Sunny Ridge Manor*, 90 I.B.C.R. 12, 13 (Bankr. D. Idaho 1990)). The burden of proving entitlement to an administrative expense priority is on the claimant. *Coolex*, 96.1 I.B.C.R. at 36 (citing *In re Hanna*, 168 B.R. 386, 388 (9th Cir. B.A.P. 1994)). In meeting this burden, the claimant must show that the claim was incurred postpetition, was an

actual and necessary expense, and directly and substantially benefitted the estate. *Id.*

When Trustee made demand upon Graves to turn over the property, she refused. Pursuant to Section 542(a), an entity in possession of property of the bankruptcy estate which the Trustee could use, sell, or lease is required to turn over such property to the Trustee, unless such property is of inconsequential value or benefit to the estate. 11 U.S.C. § 542(a). This duty is mandatory. *State of California Employment Development Department v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151 (9th Cir. 1996). Moreover, as Section 542(a) places the affirmative duty to turn over property to the trustee upon the person in possession of bankruptcy estate property, it is essentially self-executing; no action by the debtor or the trustee is necessary to compel compliance. See, e.g., *Nissan Motor Acceptance Corp. v. Baker*, 239 B.R. 484, 488 (N.D. Tex. 1999); *In re Zaber*, 223 B.R. 102, 104 (Bankr. N.D. Tex. 1998).

Smith does not deny that even if Graves held a valid security interest or lien in the subject property, the assets still constituted property of the bankruptcy estate pursuant to Section 541(a), and therefore, that he and his client were subject to a duty to turn over the items to Trustee under Section 542(a). In spite of this, Graves and Smith elected not to comply with the

Trustee's demand since they were concerned about the Trustee's handling of the property of the bankruptcy estate and his willingness and ability to keep the property safe. To support the genuineness of their concerns, for instance, Graves and Smith allege Trustee had allowed Debtor's principal to remain in possession of a remote control door opener, thereby giving him continued access to his shop which contained some large equipment left on site, subject to Graves' execution lien. Additionally, they allege that even after Trustee filed the adversary complaint for avoidance of Graves' asserted security interest and for turnover of the property, Debtor's principal apparently removed some items from the shop. Therefore, Smith and Graves argue these storage expenses were necessarily incurred, because the circumstances indicated Trustee would not adequately secure the property claimed by Graves. Trustee has not denied these circumstances are true, while of course he disputes that he would have kept the property safe from loss or damage.

Without doubt, a Chapter 7 trustee is duty-bound to keep property of the bankruptcy estate in his possession safe and secure. 11 U.S.C. § 704(2) (trustee is accountable for all property received). And while the Court is willing to accept that Graves and Smith were sincere in their concerns, they were not without other options. For example, if they could show Trustee was not

performing his duties under the Code, they could have requested an order from the Court requiring the Trustee to show the Debtor's assets were properly secured. If the alleged problem was sufficiently serious, they could have secured removal and replacement of Trustee. 11 U.S.C. § 324(a) (trustee may, after notice and hearing, be removed for "cause").

Instead, for their own reasons, Smith and Graves opted to ignore the provisions of the Code. In refusing Trustee's demand for turnover of property because they believed such was necessary to preserve Graves' rights as a creditor to the assets, they likely ran afoul of the automatic stay. See 11 U.S.C. § 362(a) (3) (stay prohibits any act to exercise control over property of the estate); *In re Del Mission Ltd.*, 98 F.3d at 1151 ("[w]ithout a doubt, a creditor's knowing retention of property of the estate constitutes a violation of § 362(a)(3)" (internal quotation and citation omitted)). Smith and Graves may have subjected themselves to a claim for damages for their conduct.

Fortunately, Trustee has not asked the Court to impose any sanctions.

At the very least, however, when Smith and Graves decided to refuse Trustee's demand to turn over the Debtor's assets, they likewise assumed

the hazard that the expenses incurred for storing the property would not be recoverable if their position was later shown to lack merit.²

With this background in mind, then, the Court must analyze whether any of the postpetition storage expenses Smith incurred were necessarily incurred for the preservation of the estate, and whether they directly and substantially benefitted the estate. Section 503(b)(1)(A); *Coollex*, 96.1 I.B.C.R. at 36 (citing *Hanna*, 168, B.R. at 388). Here, Smith began paying for storage of the property on June 18, 1997, but Debtor did not file for bankruptcy protection until July 25, 1997. Therefore, since no “estate” for purposes of Section 503 existed until the bankruptcy case was commenced, only expenses incurred after July 25 may be considered. After July 25, the Court presumes that by storing the property Smith and Graves substantially and directly benefitted the estate and other creditors by ensuring the security of this property.³ However, once Trustee made a formal demand for turnover on February 19, 1998, neither Smith nor Graves were entitled to continued possession and did

² Smith conceded at the hearing on his motion that he appreciated at the time that his and Graves’ course of action was not without legal risk.

³ Trustee has not argued that Smith and Graves’ storage of the property during the bankruptcy and prior to Trustee’s demand did not benefit the estate. Therefore, this element under Section 503 has not been placed at issue, and the Court will merely assume the storage costs benefitted the bankruptcy estate and its creditors. Trustee has also not disputed that these expenses were actually incurred by Smith.

so at their peril. Therefore, Smith is entitled to allowance of an administrative expense claim only to the extent of storage costs which were incurred between July 26, 1997, and February 19, 1998.

The Motion for Payment of Administrative Expenses is hereby **GRANTED IN PART**. Smith is entitled to an administrative expense priority for storage expenses incurred from July 25, 1997, through February 19, 1998, which on this record, the Court calculates would amount to \$481.05.⁴ In all other respects, the motion is hereby **DENIED**.

IT IS SO ORDERED.

DATED This _____ day of September, 2000.

JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY JUDGE

⁴ Smith paid \$70.00 per month, as reflected in the documents attached to his Motion. The Court pro rated amounts paid for July 1997 and February 1998 to arrive at the total.

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

Office of the U.S. Trustee
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Boise, Idaho 83701

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CASE NO.: 97-40774

CAMERON S. BURKE, CLERK
U.S. BANKRUPTCY COURT

DATED:

By _____
Deputy Clerk